

APPEAL NO. 022085
FILED SEPTEMBER 26, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 15, 2002. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the first and second quarters.

The appellant (carrier) appeals, asserting that the claimant failed to prove entitlement to SIBs as provided in the Texas Workers' Compensation Commission rules. The file does not contain a response from the claimant.

DECISION

Affirmed.

Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) set out the statutory and administrative rule requirements for SIBs. At issue in this case is whether the claimant met the good faith job search requirement of Section 408.142(a)(4) by complying with Rules 130.102(d)(4) and 130.102(e). It is undisputed that the claimant sustained a compensable neck and shoulder injury on _____; that the claimant has had cervical surgery and two shoulder surgeries; and that the qualifying period for the first quarter was from July 12 through October 10, 2001, with the qualifying period for the second quarter being from October 11, 2001, through January 9, 2002.

The claimant asserts that she had met the good faith job search requirement of Rule 130.102(b)(2) by compliance with Rule 130.102(d)(4) for the first quarter. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. The hearing officer determined that the claimant was totally unable to perform any type of work in any capacity during the first quarter and cites a report from Dr. SE as providing the narrative report which specifically explains how the injury causes a total inability to work. Dr. SE references the three surgeries, documents that the claimant "was bedridden with an E. Coli infection since July [2001]," and explained how the E. Coli infection was related to the use of pain medication to treat the compensable injury. Dr. SE also explains how the claimant's depression and narcotic addiction are related to her surgeries. The only other record which indicates that the claimant may be able to return to work is in an functional capacity evaluation (FCE) dated October 26, 2001, which indicates that the claimant has a physical ability to perform work at the sedentary level, but cautions that assessment "is not, however, an indication of what the client can sustain over time nor does this indicate that the client is safe to return to work at this

level.” Although the hearing officer did not discuss or reference the FCE, fairly clearly the argument at the CCH was that the FCE only addressed the claimant's physical ability on the date of the FCE and did not address the claimant's depression, psychological condition, or the effects of the narcotic addiction and resulting E. Coli infection. The hearing officer's determination on SIBs for the first quarter is affirmed.

The claimant entered a full-time pain management program on November 1, 2001. It is undisputed that the program ran from 8:00 am to 5:00 pm Mondays through Fridays. Depending on which documentation is relied on, the program ran for four or six weeks. The claimant testified that she missed a two-week period due to flu or “stomach distress.” A note from a psychologist indicates that the claimant was asked to see her primary care physician for this condition. Upon completion of the pain management program in mid-December 2001, the claimant made some 18 job contacts during the remaining three and one-half weeks of the second quarter qualifying period.

The Appeals Panel has recognized that a claimant may satisfy the good faith requirement under a hybrid theory. Texas Workers' Compensation Commission Appeal No. 002428, decided December 1, 2000 cited Texas Workers' Compensation Commission Appeal No. 001877, decided September 19, 2000, noting that a claimant could satisfy the good faith requirement by demonstrating that he or she had no ability to work for part of the qualifying period and by conducting a good faith job search in the other part of the qualifying period. However, in order to prevail, the claimant must produce evidence that established the requirements of Rule 130.102(d)(4) for the period of time that no ability to work was asserted and evidence that meets the criteria of Rule 130.102(e) for that period of time wherein a good faith job search was claimed. The requirements of Rule 130.102(d)(4) are met by Dr. SE's report of the office visit of October 18, 2001 (Claimant's Exhibit No. 8), referencing Dr. JE pain management program. The hearing officer determined that the claimant had a total inability to work in any capacity while she was in the full-time, 45-hour-per-week pain management program and that she met the requirements of Rule 130.102(e) when she finished that program.

After review of the record before us and the complained-of determinations, we have concluded that there is sufficient legal and factual support for the hearing officer's decision. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TEXAS COUNCIL OF RISK MANAGEMENT** and the name and address of its registered agent for service of process is

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FRANCIS FAYE
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Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge